UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

COMMODITY FUTURES TRADING COMMISSION, *Plaintiff*, v. SENTINEL MANAGEMENT GROUP, INC., ERIC A. BLOOM, and CHARLES K. MOSLEY *Defendants*.	)	Case No. 08 CV 2410 Hon. Charles P. Kocoras

PLAINTIFF'S MEMORANDUM OF LAW IN SUPPORT OF ITS RULE 59(e) MOTION FOR RECONSIDERATION AND TO ALTER OR AMEND JUDGMENT

Plaintiff, Commodity Futures Trading Commission ("CFTC" or "Commission"), respectfully moves this Court for partial reconsideration of its March 30, 2012 Judgment Order and Memorandum Opinion[1] denying the CFTC's Motion for Summary Judgment against Eric A. Bloom ("Bloom") and Charles K. Mosley ("Mosley") (collectively, "Defendants"), and granting Bloom's and Mosley's Cross-Motion for Summary Judgment against the CFTC.[2] In its Opinion, this Court denied the CFTC's Motion and granted Defendants' Cross-Motion finding that the CFTC could not establish the derivative liability it sought against Defendants under Sections 4b, 4d(a)(2)

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[1] References in this brief in the form "Op. at __" are to the Court's March 30, 2012 Memorandum Opinion ("Opinion") (D.E. #159), references in the form "Memo at__" are to the CFTC's Memorandum of Law in Support of its Motion for Summary Judgment ("Motion") (D.E. #123-22), and references in the form of "SEC Op. at____" are to the Court's March 30, 2010 Memorandum Opinion ("SEC Opinion") (D.E. #255) in *S.E.C. vs. Sentinel Management Group, Inc. et al.*, No. 7-cv-4648 (N.D. Ill., Aug. 20, 2007).

[2] Mosley did not file a Cross-Motion for Summary Judgment against the CFTC. Rather, Mosley filed a Response to the CFTC's Motion for Summary Judgment (D.E. #146), wherein he adopted and incorporated as part of his Response Bloom's Cross-Motion for Summary Judgment ("Cross-Motion") (D.E. #125), Memorandum of Law in Support (D.E. #126) and Consolidated Local Rule 56.1 Statement of Undisputed Facts (D.E. #127) against the CFTC.

and 4d(b) of the Commodity Exchange Act ("Act") and Commission Regulations 1.10, 1.20, 1.22 and 1.23 because it could not establish primary liability against their employer, Sentinel Management Group, Inc. ("Sentinel"), a now defunct entity that was registered as a futures commission merchant ("FCM"). For the reasons set forth below, the CFTC respectfully requests the Court to reconsider and alter or amend its Opinion denying the CFTC's Motion and granting summary judgment in favor of Defendants regarding Defendants' violations of Sections 4b and 4d(b) of the Act due to manifest error of law, and to grant in part the CFTC's Motion against Defendants for violating Sections 4b and 4d(b) of the Act.[3]

II. LEGAL STANDARD

Rule 59(e) allows for a motion to alter or amend a judgment within 28 days after the entry of the judgment. *See* Fed. R. Civ. P. 59(e). To succeed on a Rule 59(e) motion, the moving party must present newly discovered evidence, point out an intervening change in controlling law or establish that the court committed a manifest error of law or fact. *Caisse Nationale de Credit Agricole v. CBI Indus., Inc.*, 90 F.3d 1264, 1269-70 (7th Cir. 1996); *County of McHenry v. Ins. Co. of the West*, 438 F.3d 813, 819 (7th Cir. 2006). "A 'manifest error' is a wholesale disregard, misapplication, or failure to recognize controlling precedent. *Rhodes v. Luy*, No. 08-c-50, 2009 WL 774449, at *1 (E.D. Wis. Mar. 19, 2009) (quoting *Oto v. Metro Life Ins. Co.*, 224 F.3d 601, 606 (7th Cir. 2000)).

Reconsideration is appropriate in circumstances such as "where (1) the court has patently misunderstood a party; (2) the court has made a decision outside the adversarial issues presented to the court by the parties; (3) the court has made an error not of reasoning but of apprehension;

[3] Although the CFTC does not seek reconsideration of the Court's ruling on Counts II, IV and V of the CFTC's Complaint regarding violations of Sections 4d(a)(2), 4g(a) and Regulations 1.10, 1.20, 1.22 and 1.23, the CFTC reserves its right to appeal the Court's ruling on those Counts and any other adverse rulings in this matter.

(4) there has been a controlling or significant change in law . . . or (5) there has been a controlling or significant change in the facts." *BP Amoco Chem. v. Flint Hills Res., LLC*, 489 F. Supp. 2d 853, 856 (N.D. Ill. 2007); *Bank of Waunakee v. Rochester Cheese Sales, Inc.*, 906 F.2d 1185, 1191 (7th Cir. 1990). Determining whether to grant a Rule 59(e) motion is at a district court's discretion. *See Pickett v. Prince*, 207 F.3d 402, 407 (7th Cir. 2000) (stating "[A] motion to reconsider a ruling is constrained only by the doctrine of the law of the case. And that doctrine is highly flexible, especially when a judge is being asked to reconsider his own ruling.") (citations omitted). "The rule essentially enables a district court to correct its own errors, sparing the parties and the appellate courts the burden of unnecessary appellate proceedings." *Russell v. Delco Remy Division of General Motors Corp.*, 51 F.3d 746, 749 (7th Cir. 1995). A Rule 59(e) motion "properly is granted where the movant demonstrates that the judgment is based upon manifest errors of law or fact." *Bowers v. Andrew Weir Shipping, Ltd.*, 817 F. Supp. 4, 5 (S.D.N.Y. 1993), *aff'd*, 27 F.3d 800 (2d Cir. 1994).

III. ARGUMENT

A. THE COURT'S FINDING THAT SENTINEL DID NOT VIOLATE SECTION 4d(b) OF THE ACT AND DID NOT RECEIVE CUSTOMER FUNDS IS A MANIFEST ERROR OF LAW

1. The Act, and Section 4d(b) in Particular, Reflects Congress' Intent That Customer Funds Retain Their Legal Character As Customer Funds When Invested By Any Person Entrusted With Them

In its Opinion, the Court held that there could be no violation of Section 4d(b) because "Sentinel did not…receive customer funds as required by Section 4d(b)." Op. at 18. The Court based that holding on the finding that Sentinel's client FCMs did not deposit funds with Sentinel to margin, guarantee, or secure any futures contracts. Implicit in these findings is the assumption that customer funds originally received by an FCM can somehow lose their legal character as

customer funds if temporarily transferred by the FCM to another person or persons for investment. Plaintiff respectfully submits that assumption is manifestly contrary to the Act and Regulations. Section 4d(b) states as follows:

> It shall be unlawful for any person, including but not limited to any clearing agency of a contract market or derivatives transaction execution facility and any depository, that has received any money, securities, or property for deposit in a separate account as provided in paragraph (2) of this section, to hold, dispose of, or use any such money, securities, or property as belonging to the depositing futures commission merchant or any person other than the customers of such futures commission merchant.

The text of Section 4d(b) clearly contemplates and permits any person, including persons ***who are not in the business of margining or guaranteeing futures trading*** (such as a depository) to receive customer funds and explicitly requires such persons to protect those funds. Moreover, the phrasing "hold, dispose of, or use" imposes a broad prohibition on conduct inconsistent with commodity customers' interests, and not merely a prohibition on taking liens. *See Khan v. United States*, 548 F.3d 549, 554 (7th Cir. 2008) (in determining plain meaning of statute court should "give effect, if possible, to every clause and word of a statute,") (quoting *Duncan v. Walker*, 553 U.S. 167, 174 (2001)).

The legislative history of Section 4d(b) supports the Commission's interpretation of its plain language that customer funds do not lose their legal character as customer funds while they are invested by FCMs, depositories or any person entrusted with handling them. The House Agriculture Committee summarized the bill language that became Section 4d(b) as follows:

> Presently, futures commission merchants are required to segregate customers' funds in separate accounts. The depository of such funds would be prohibited from treating ***them*** as belonging to the futures commission merchant or any ***person other than the customers.*** This is to prevent their being used to offset liabilities of the commission merchant, for example.

H.R. Rep. No. 90-743 at 3 (1967) (emphasis added). The Senate Committee on Agriculture and Forestry similarly stated that the purpose of the provision is "to prohibit expressly customers'

funds from being used to offset liabilities of the futures commission merchants ***or otherwise being misappropriated***." S. Rep. No. 90-947 at 7 (1968) (emphasis added). This purpose would be seriously undermined if, as the Court found here, customer funds lost the protection of Section 4d(b) merely by being transferred at the instruction of an FCM seeking to temporarily invest customer funds in Regulation 1.25 approved instruments, pending their use to guarantee or margin trades.

The customer funds at issue in this case originated with the customers of the client FCMs that did business with Sentinel. Memo at 10. When Sentinel established segregated accounts for these customer funds at The Bank of New York Mellon Corporation ("BNY") it did so on behalf of its client FCMs, to enable those FCMs to maintain funds in segregation, as required by law, while still enjoying the benefits of Sentinel's investment services. Memo at 9-10. Sentinel knew and acknowledged in writing that the customer funds it held were to be used to margin commodity interest trades at the FCMs and Sentinel represented to those FCMs, the CFTC and the National Futures Association ("NFA"), that it would segregate those funds in compliance with the Act and the Regulations. (Plaintiff's Statement of Facts, D.E. #123-1, ¶¶ 4-7, 22-23).

2. Section 4d(b) Protects Commodity Customer Funds That FCMs Have Placed in Accounts with Third Parties for Investment

In its Opinion the Court held that the funds placed with Sentinel were not customer funds protected by Section 4d(b) because Sentinel's client FCMs "did not deposit funds with Sentinel to margin, guarantee, or secure any futures contracts." Op. at 18 This was so, according to the Opinion, because the client FCMs "gave Sentinel money to invest in non-futures transactions." *Id*. We respectfully submit that this analysis misreads Section 4d. Under Section 4d, there is no contradiction between using funds to "margin, guarantee, or secure" futures contracts and

placing the funds in third party accounts for investment in non-futures instruments. To the contrary, Section 4d(a)(2) and Regulation 1.25 explicitly permit this.

There is no contradiction between using funds as margin and investing them in non-futures instruments because, under Section 4d, funds are used to "margin, guarantee, or secure" futures transactions when they are available to the FCM, if necessary, to fulfill customer financial obligations arising out of futures transactions made through the FCM. *Craig v. Refco, Inc.*, 624 F. Supp. 944, 944-45 (N.D. Ill. 1985) (margin is a performance bond deposited by a customer to ensure the customer's performance of obligations to his broker and other parties in connection with futures transactions). Margin is thus a form of collateral, in this case, guaranteeing future performance. Just as collateral is used with other financial transactions, investment instruments such as bonds can serve as perfectly good collateral for obligations arising from futures transactions so long as they are held in a customer account where the FCM can access them (or access the proceeds of sales of the instruments) when needed to cover customer obligations in connection with futures transactions. To bring the funds within the scope of Section 4d, the original FCM who received and deposited the funds—like Sentinel's client FCMs in this case—must be involved in, and using the funds to guarantee, futures trades. It is irrelevant whether the third party custodian who holds the customer funds is itself involved in futures trading.

All of these principles are directly reflected in the language of the statute. Section 4d applies when an FCM has received "money, securities, and property" from customers, to "margin, guarantee, or secure" futures trades and contracts. FCMs are not required to keep such "customer funds" [4] in their personal possession. Section 4d(a) of the statute expressly authorizes

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[4] Commodity customer funds are defined in Regulation 1.3(gg)(1), 17 C.F.R. § 1.3(gg)(1) (2007), to include all money, securities, and property received by an FCM or by a clearing organization from, for, or on behalf

FCMs to deposit customer funds in accounts with third parties, specifically banks, trust companies, and clearing organizations. Commission rules also permit deposits with other FCMs. 17 CFR § 1.20(a)(2007). Moreover, funds in accounts with third party custodians remain protected under Section 4d even though the third party custodians are not engaged in any futures trading. *See* Section 4d(b) (funds protected against misuse by "**any person**, including but not limited to … any depository … .")(emphasis added). Such funds are still being used to "margin, guarantee, or secure" futures trades and contracts because they are available to the depositing FCM, when necessary, to meet its customers' financial obligations in connection with futures trades. *See* Section 4d(a)(2) (An FCM can withdraw funds from third party customer accounts to meet customer obligations in connection with futures trades).

Section 4d similarly does not require that customer funds sit idle until such time as they may be needed to meet customer obligations in connection with one or another futures transaction. Section 4d(a) explicitly permits FCMs to invest customer funds in certain government securities, subject to Commission Regulations, and Commission Regulations have extended the permissible forms of investment of customer funds by FCMs, depositories and any person entrusted with handling them. 17 C.F.R. § 1.25 (2007). None of these investments change the character of customer funds or take them outside the scope of Section 4d(b). *See e.g.* 17 C.F.R. §§ 1.26, 1.27 and 1.28 (2007).[5]

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of, customers or option customers to margin, guarantee, or secure contracts for future delivery on or subject to the rules of a contract market and all money accruing to such customers as the result of such contracts.

[5] Regulation 1.26 requires each FCM ***who invests customer funds*** in regulation 1.25 approved instruments to separately account for such instruments and to segregate such instruments as belonging to such commodity customers and when deposited with a depository or another FCM, they shall be deposited under an account name which clearly shows that they belong to commodity customers and are segregated as required by the Act and Regulation 1.26.

Regulation 1.27 requires each FCM to maintain detailed records of the investments of customer funds made in accordance with Commission Regulation 1.25, 17 C.F.R. § 1.25 (2007).

It might be argued that Sentinel was not subject to Section 4d(b) because it was not one of the entities enumerated in Section 4d(a)(2) (*i.e.*, it was not a bank, trust company, or clearing organization) and because this Court has held that it was not an FCM, so it was not a proper recipient of customer funds under 17 C.F.R. § 1.20(a) as well. This line of reasoning is precluded by the language of Section 4d(b), which imposes duties on **"any person"** holding "money, securities, or property" placed with it by an FCM for deposit in an account for the FCM's customers and is explicitly "not limited to" particular entities mentioned in Section 4d(a)(2) or Commission Regulations.[6] Any other approach would lead to highly anomalous results because entities that are not depositories, trust companies or clearing houses that receive customer funds would have fewer constraints on their ability to misappropriate such funds than the enumerated entities and because customers would lose the protection intended by Congress merely because their FCM made a mistake of law in choosing to invest with a particular entity. The language of Section 4d(a)(2) avoids such results, and, in doing so, squarely applies to Sentinel in this case.

3. The Court's Narrow Interpretation of Section 4d(b) is Inconsistent with the Way Margin is Routinely Handled in the Futures Industry, Compromises The Act's and Commission Regulations' Protections of Customer Funds and Could Disrupt the Entire Futures Market

The futures market cannot function unless customers and FCMs have immediate access to customer margin funds. Customers rely upon the collateral they have supplied to support their own trading, and FCMs rely upon customer collateral to support their customers' positions – that

Regulation 1.28 requires FCMs investing customer funds in instruments described in Regulation 1.25 to include such obligations in segregated account records and reports at values which at no time exceed current market value, determined as of the close of the market on the date for which such computation is made.

[6] If an FCM places customer funds with an entity that is not a depository, trust company or clearing house, the FCM might well be in violation of Commission Regulations. However, under Section 4d(b) of the Act, which protects funds from misuse by "**any person**," the customer funds still retain their legal character as customer funds.

is, to meet their obligations to the clearinghouse (or to other, intermediary FCMs) to cover losses arising from such positions. When an FCM enters into a futures contract on behalf of its customer, subsequent price changes affect the value of the position. To clarify the concept and role of margin, it is useful to note that margin is simply a "performance bond" and does not involve any extension of credit, but rather acts as collateral in the case of adverse market movements and subsequent defaults and losses. Price movements may cause an open futures position to suffer a loss. These losses must be met by the customer, and the FCM will issue "margin calls" to the customer requiring the customer to do so. Moreover, an FCM is permitted to use a customer's collateral, pending payment by the customer, to meet obligations to the clearinghouse arising from that customer's positions.

More crucially, one of the central purposes of segregation is to protect customers in the event of the insolvency of the FCM. It is only when customer funds are clearly and effectively segregated that they can be reliably reserved for return to customers, and reliably available for prompt transfer (along with positions) to a solvent FCM. *See, e.g.*, 11 U.S.C. § 764(b) (protecting from avoidance transfers within seven days of the filing date, from an insolvent commodity broker, that are approved by the Commission). Section 4d(b) is what requires a depository of customer funds to give effect to this protection. Under the Court's interpretation of Section 4d(b), which would immunize any depository that is not a trading intermediary – such as a bank– this protection is eviscerated. At the very time that protection of an FCM's customer funds is most essential – when the FCM becomes insolvent – the Court's interpretation of Section 4d(b) would permit a non-trading depository, including a bank, to deny the Trustee, representing customers, access to those funds, under a claim that those funds belong to the bank

(as a creditor of the FCM) or someone else other than the customers of the FCM, pending the results of litigation over the question, all free of liability under Section 4d(b) of the Act.

Further, under the Court's interpretation of Section 4d(b), FCMs could not have immediate access to customer margin funds temporarily invested with a depository or other person. Without immediate access to customer funds, the FCM is hindered in its ability to satisfy margin requirements. In times where there is a market disruption, any impediment or restriction upon the ability to immediately withdraw funds "could magnify the impact of any market disruption and cause additional repercussions." *See Financial and Segregation Interpretation No. 10* ("Interpretation No. 10"), 70 Fed. Reg. 24768 (May 11, 2005) ("[a]lthough it is permissible under Section 4d(2) of the Act to deposit customer funds in a bank, it has always been the Division's position that customer funds deposited in a bank cannot be restricted in any way, that such funds must be held for the benefit of customers and must be available to the customer and the FCM immediately upon demand.") *See also Financial and Segregation Interpretation No. 9 – Money Market and Now Accounts*, 1 Comm. Fut. L. Rep. (CCH) 7119 (Nov. 23, 1983) (customers are required to have immediate access to their funds held in customer segregation accounts).

Specifically, without immediate access to customer margin funds, FCM clearing members would be required to cover their customers' margin calls and other shortfalls by providing their proprietary funds to their clearing houses. *See Ryder Energy Distribution Corp. v. Merrill Lynch Commodities, Inc.*, 748 F.2d 774, 776 (2d Cir. 1984) ("FCMs are treated as principals in the trading and the clearinghouse collects margin payments from them."), and Chicago Mercantile Exchange ("CME") Rule 903.[7] When the FCMs are no longer able to

[7] CME Rule 903 Responsibility for Qualified Members provides in relevant part, "A. It shall agree to guarantee and assume complete responsibility for the financial obligations attendant to: 1) all trades and

support their customers' positions, the clearing houses are left with a deficit that they would pass on to their clearing members and when the members cannot satisfy the deficit the clearing houses default resulting in the inability to offset transactions and bringing the market to a halt.

B. THE COURT'S FINDING THAT SENTINEL DID NOT VIOLATE SECTION 4b OF THE ACT IS A MANIFEST ERROR OF LAW

1. The Court's Interpretation of Section 4b's "In Connection With" Requirement is Overly Narrow and Inconsistent with the Statute's Purpose

Contrary to the Court's opinion, the "in connection with" requirement of Section 4b is not restricted to instances where the defendant has "solicited or accepted orders for the purchase or sale of futures contracts," and Section 4b may apply to fraudulent conduct that occurs outside the execution of a trade. Op. at 12. Congress intended a broader application of Section 4b to protect futures customers from being cheated or defrauded by not only members of contract markets during the purchases and sales of futures contracts, but by their correspondents, agents, and employees. *See* Act to Amend the Commodity Exchange Act, § 5(a)(2), Pub. L. 90-258, 82 Stat. 26, 27 (1968) *relevant sections codified as amended* at 7 U.S.C. 6b(a). Specifically, during the House Committee hearings about the bill that became the 1968 amendments to the Act, Assistant Secretary of Agriculture George L. Mehrens explained the purpose of amending Section 4b, stating that, "4b be expanded to cover all persons who handle customer orders ***or funds***.... [t]he proposed legislation ... would ... give customers who deal in commodity futures with nonmembers the full protection of the Act." *See* Act to Amend the Commodity Exchange Act, Hearings on H.R. 11930, House Comm. on Agriculture, 90th Cong., 1st Sess. 51 (1967) (Statement of Assistant Secretary of Agriculture)(emphasis added), reprinted in 113 Cong.Rec. 23651 (Aug. 22, 1967); *See also* S.Rep.No.947, 90th Cong., 2d Sess. 6 (1968), *reprinted in* 1968

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orders executed or accepted for execution by a member it qualifies, including trades and orders executed, or which such member fails to execute, negligently, fraudulently or in violation of Exchange rules. . ."

U.S.Code Cong. & Ad. News 1673, 1679. The Act expressly states that "[i]t is the purpose of this Act to . . . ensure the financial integrity of all transactions subject to this Act . . . and protect all market participants from fraudulent or other abusive sales practices and misuses of customer assets . . ." 7 U.S.C. § 5(b).

Legislative history, judicial precedent and Commission case law establish that the "in connection with" element of Section 4b covers more than just misconduct in the solicitation and execution of futures transactions and covers conduct much farther removed from the purchase and sale of futures contracts than occurred here. *See In re R&W Technical Services, Ltd.*, [1998-1999 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 27,582 at 47,743-44 (internal citations and footnotes omitted) (CFTC Mar. 16, 1999), *aff'd in part, rev'd in part and remanded sub nom. R&W Technical Services, Ltd. v. CFTC*, 205 F.3d 165 (5th Cir. 2000) (courts have found violations of Section 4b(a) to exist where futures trading has not yet occurred; where the actors are neither members of a contract market nor directly involved in the sale or purchase of the futures contracts; and where misrepresentations were made not about the underlying contracts to be traded, but about the quality of the source of the trading decisions), and *Saxe v. E.F. Hutton & Co.*, 789 F.2d 105,110-11 (2d Cir. 1986) (misrepresentations regarding the profitability and risks of a trading system were "in connection with" the purchase or sale of futures contracts). Consistent with Section 4b's legislative history, the Seventh Circuit in *Hirk v. Agri- Research Council, Inc.* 561 F.2d 96, 103 (7th Cir. 1977) stressed that "[b]y its terms, Section 4b is not restricted in its application to instances of fraud or deceit 'in' orders to make or the making of contracts. Rather, Section 4b encompasses conduct 'in or in connection with' futures transactions. The plain meaning of such broad language cannot be ignored." Here, the customer margin funds deposited with Sentinel were directly connected to the futures transactions of the

customers of Sentinel's FCM clients. Those customers were required by the FCMs to deposit margin funds before they could trade futures and needed those funds for margin calls and other short falls that occurred in their accounts in order to trade futures. Consequently, Sentinel's misuse of those customer funds was directly connected to futures trading.

2. The "In Connection With" Requirement Found in Section 10(b) of the Securities Exchange Act is Broadly Construed

The Court also turns to Section 10(b) of the Securities Exchange Act of 1934, 15 U.S.C. § 78j(b) as part of its analysis of Section 4b's "in connection with" requirement. Section 10(b) prohibits the use, "in connection with the purchase or sale of any security," of "any manipulative or deceptive device or contrivance." As with Section 4b, the in connection with requirement of Section 10(b) is not restricted to misconduct in the solicitation and execution of securities transactions. For example, in *SEC v. Dibella*, the SEC charged Dibella with fraud because he encouraged his friend, the state Treasurer Silvester, to invest state funds into a pension fund allowing Dibella to obtain a finder's fee. 2005 WL 3215899, *1 (D. Conn. 2005). Subsequently, Silvester arranged with the pension fund's manager (Malek) to invest state funds in Malek's managed fund *provided* Dibella received the undeserved finder's fee. 2005 WL 3215899, *3. Dibella argued that the SEC could not satisfy the "in connection with" requirement because the SEC's allegation that he did no meaningful work regarding the purchase of the underlying securities necessarily required a finding that his arrangement with Silvester and Malek was independent of the purchase of securities. *Dibella*, 2005 WL 3215899 at *7. The court ruled in favor of the SEC finding that the fraudulent scheme between the parties "was included in the negotiation of the Pension's Funds investment between Silvester and (Malek)…[thus] the Complaint alleges primary violations that occurred in connection with the sale of the [ ] securities." *Id.*

Notably, federal courts have long adopted a broad interpretation of the "in connection with" language of Section 10(b). *See SEC v. K.W. Brown and Co*., 555 F. Supp. 2d. 1275, 1306 (S.D. Fla. 2007) ("in connection with requirement satisfied if the "fraud ... somehow 'touch[es]' upon securities transactions") (quoting *SEC v. Rana Research, Inc*., 8 F.3d 1358, 1362 (9th Cir. 1993) (internal citations and quotations omitted). This broad interpretation of the "in connection with" language is especially true in actions where the SEC is the plaintiff. *Rana Research*, 8 F.3d at 1362. Therefore, conduct that is part of a fraudulent scheme which involves securities transactions meets the "in connection with" requirement. *SEC v. Zandford*, 535 U.S. 822-23 (2002) (reversing Fourth Circuit's dismissal of complaint for failing to meet the "in connection with" test). Thus, as with Section 4b of the Act, Section 10(b) does not require the defendant to engage in purchases and sales of securities in order to satisfy the "in connection with" requirement of that provision.

3. Sentinel's Investment of Customer Margin Funds Was In Connection With Futures Transactions

Sentinel's investment of customer funds had a direct "nexus with" the futures transactions of its FCM clients. First, Defendants knew that Sentinel's FCM clients had deposited their customers' margin funds with Sentinel for investment, which were required by the FCMs to be deposited before the customers could trade futures. Memo at 7. As Defendants also knew, Sentinel's FCM clients were required to provide margin funds to the exchanges before their customers could trade futures. SEC Op. at 3; D.E. #127 at ¶¶ 6, 8, 10, 15, 42; Memo at 10. Second, Sentinel promised its FCM clients that it would meet their redemption requests for their customers' margin funds on a same day basis. D.E. #127 at ¶¶ 6-8, 10; SEC Op. at 2-3. Third, Sentinel maintained a number of customer segregated accounts at BNY and JP Morgan Chase Bank through which it accepted deposits of margin funds subject to the Act and

Regulations, in particular to the investment standards embodied in Regulation 1.25. These three facts, none of which were disputed by Defendants, demonstrate that Sentinel's investment of customer margin funds was intertwined with the futures transactions of its FCM clients. Without access to these margin funds, the customers of Sentinel's FCM clients would not have been able to trade futures. Thus, Sentinel's misuse of customer funds was directly in connection with futures transactions. Memo at 8-10. As the Court suggests, if one of Sentinel's FCM clients had misappropriated customer funds instead of Sentinel, the conduct would fall under Section 4b of the Act. (Op. at 13) The customer margin funds Sentinel's client FCMs temporarily invested with Sentinel remained customer margin funds and were still necessary for their customers' futures trading regardless of whether the customer margin funds were invested with Sentinel or in the hands of Sentinel's client FCMs.

IV. CONCLUSION

The CFTC respectfully requests that this Court reconsider and amend its Opinion granting summary judgment in the CFTC's favor as to Counts I and III of the CFTC's complaint, and find that Sentinel violated Sections 4b and 4d(b) of the Act and Bloom and Mosley are derivatively liable for Sentinel's violations. In the alternative, the CFTC requests that the Court determine that the CFTC has set forth sufficient evidence to demonstrate a genuine issue of material fact to defeat summary judgment in favor of Bloom and Mosley as to Counts I and III of the CFTC's Complaint and their violations of Sections 4b and 4d(b) of the Act.

Dated: April 26, 2012

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